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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2072

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The court of appeals' decision (Pet. App. A1-A73) is reported at 634 F. 2d 137. The court of appeals' subsequent order granting a petition for rehearing and adhering to its previous opinion as supplemented (Pet. App. B1-B8) is reported at 639 F. 2d 1104. The decision of the Interstate Commerce Commission (Pet. App. C1-C52) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1980. On February 26, 1981, the court of appeals entered an opinion granting a petition for rehearing and reinstating its prior opinion as supplemented. The petition for a writ of certiorari was filed on June 5, 1981. This

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[1]The parties to the proceedings below are listed in the petition (Pet. ii).

Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATEMENT

1. This case arose on petition for review of the Interstate Commerce Commission's approval of a rate proposed by the petitioners under former Section 10729 of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 10729, applicable to train shipments of coal from the Colowyo Coal Company's mine in Axial, Colorado, to respondent Central Power & Light Company's (CP&L) electric generating plant near Coleto Creek, Texas.[2] Under Section 10729, a proposed rail freight rate requiring a total capital investment of at least $1,000,000 to implement was entitled to special treatment. Specifically, the Commission was required to act on the proposal within 180 days after it was proposed and, unless it was declared unlawful within that period, "the Commission [could not] for 5 years [thereafter], suspend or set it aside" as unreasonable, discriminatory or violative of other specific provisions of the Act.[3]

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[2]Section 10729 was originally enacted as Section 15(19) of the Interstate Commerce Act, 49 U.S.C. 15(19), by Section 206 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 41-42. Section 15(19) became Section 10729 when the Interstate Commerce Act was recodified by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. The recodified Act was not intended to effect any substantive changes in laws enacted prior to May 16, 1978. See 92 Stat. 1466.

Section 10729 was repealed by Section 210(a) of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1910. However, pursuant to Section 210(b) of the Staggers Rail Act (see Pet. App. S2-S3) rates already established under Section 10729 retained the special protection afforded by the latter provision.

[3]Although there are statutorily imposed time limits on Commission investigations of railroad rates in normal cases, see 49 U.S.C. (Supp. III) 10707(b), those time limits do not bar the Commission from reopening or reconsidering a decision, see 49 U.S.C. (Supp. III) 10327(g), or entertaining a new complaint concerning the same matter, 49 U.S.C.

Legislative history reveals that Congress enacted Section 10729 to provide an incentive for large capital investments in the rail industry. Based at least in part on the history of one major Commission proceeding,[4] Congress was concerned that such investment might be inhibited by the prospect of protracted proceedings involving rate schedules predicated on large-scale investments in rail facilities. See *Rate Incentives for Capital Investment*, 353 I.C.C. 754 (1977); *Houston Lighting & Power Co.* v. *United States*, 606 F. 2d 1131, 1137-1145 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The special procedures and protections of Section 10729 were designed to provide investors with an expeditious determination of the lawfulness of rate schedules on which their investment expectations rested. *Rate Incentives, supra*, 353 I.C.C. at 762.

Between the time of its enactment and its repeal in 1980 (see note 2, *supra*), only five rate proposals were made to the Commission under Section 10729. All involved large-volume, long-distance shipments of coal from western mines to major coal consumers—electric generating facilities in four instances and, in the remaining case, a large industrial firm. Each was predicated upon capital investments by the railroads involved and each was protested by

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(Supp. III) 11701. An ordinary railroad rate filed under Section 10707 can be set aside if the Commission subsequently finds it to be unlawful. See *Houston Lighting & Power Co.* v. *United States*, 606 F. 2d 1131, 1141-1142 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980).

[4] *Grain in Multiple-Car Shipments—River Crossings to the South*, 318 I.C.C. 641, rev'd, 321 I.C.C. 582 (1963), rev'd *sub nom. Cincinnati, N.O. & T.P. Ry.* v. *United States*, 229 F. Supp. 572 (S.D. Ohio 1964), vacated per curiam *sub nom. Arrow Transport Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642, on remand, *Grain in Multiple Car Shipments—River Crossings to the South*, 325 I.C.C. 752 (1965).

This proceeding, known as the "Big John" case, was considered the paradigm of regulatory delay, and prompted an incentive rate proposal which was a forerunner of Section 10729 (see Pet. App. A22-A23).

the shipper. In the first two cases to be considered,[5] the Commission found the proposed capital incentive rates lawful and permitted the rates to take effect. The Commission's decisions were upheld on judicial review and the capital incentive rates remain in effect, protected from challenge by Section 10729's five-year immunity provision. In a third case, the Commission found the proposed capital incentive rate not qualified for consideration under the statute.[6] The two remaining cases are the instant one and its companion pending on petition for a writ of certiorari, No. 80-2068,[7] where the Commission's decisions approving capital incentive rates were vacated and remanded for further proceedings.

2. The railroads filed their proposed capital incentive rate of $20.85 per net ton on July 19, 1979. CP&L protested the rate proposal and the Commission instituted an investigation. In order to establish the eligibility of their proposal under Section 10729, the railroads cited an estimated capital investment of more than $50 million required to implement the unit train service. Roughly half of this total was attributed to the cost of 37 new locomotives at $775,000

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[5] *Incentive Rate on Coal—Cordero, Wyoming to Smithers Lake, Texas*, 358 I.C.C. 537 (1977), aff'd *sub nom. Houston Lighting & Power Co.* v. *United States*, 606 F. 2d 1131 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980), and *Incentive Rate on Coal—Gallup, New Mexico to Cochise, Arizona*, 357 I.C.C. 683 (1977), aff'd *sub nom. Houston Lighting & Power Co.* v. *United States, supra.*

[6] *Incentive Rate on Coal—Belle Ayr, Wyoming to Council Bluffs, Iowa*, 359 I.C.C. 201 (1978).

[7] *Incentive Rate on Coal—Hayden, Colorado to Kings Mill, Texas*, 359 I.C.C. 749 (1979), rev'd *sub nom. Celanese Chemical Co.* v. *United States*, 632 F. 2d 568 (5th Cir. 1980), petition for cert. pending *sub nom. Atchison, T. & S.F. Ry.* v. *I.C.C.*, No. 80-2068 (filed June 5, 1981). The petitioners in the instant case, with the exceptions of the Southern Pacific Transportation Company, are petitioners in No. 80-2068, as well. The first question presented for review in this case is also presented for review in No. 80-2068.

each, and half to replacement and upgrading of trackage (Pet. App. C4-C8). CP&L argued that the proposed rate was ineligible for consideration under Section 10729, asserting that the railroads' projected expenditures, to the extent required, were merely normal operating expenditures required to provide basic rail service (*id.* at C8-C9).

CP&L's principal contention, however, was that the proposed rate was unreasonably high. In order to obtain Commission review of the rate level, CP&L had to carry the burden of showing that the railroads enjoyed market dominance over CP&L's coal traffic—that is, "an absence of effective competition from other carriers or modes of transportation" for the freight traffic. See 49 U.S.C. (Supp. III) 10709. CP&L attempted to demonstrate that it was tied to the particular carriers involved in this proceeding because: (1) it was contractually obligated, for a 25-year period, to its coal supplier, which was served only by one of the railroad petitioners (Pet. App. C12, C42-C50) and (2) that CP&L itself had made substantial capital investment in rail related equipment which precluded use of transportation alternatives (*id.* at C13). CP&L also introduced evidence suggesting that the proposed rate would yield revenues approximating 200 percent of the railroads' cost of providing the service (*id.* at C10). The railroads introduced rebuttal evidence tending to show that neither CP&L's coal supply contract nor its investments in rail related facilities tied CP&L to them in such a way as to establish their dominance over CP&L's market (*id.* at C12-C14).

In its decision, issued January 15, 1980, the Commission found that the petitioners' proposed rate qualified for capital incentive treatment but that CP&L had failed to show that the railroads dominated the market affected, and that the Commission accordingly lacked jurisdiction to consider the reasonableness of the rate proposed (Pet. App. C14). The Commission's order permitted the railroads to file the

capital incentive rate, noting the five-year protection fr challenges under the Act (*id.* at C15). Following the Co mission's decision, the railroads published the rate a implemented the service. CP&L filed its petition for revi on January 18, 1980.

3. On April 30, 1980, the Commission voted to reop the proceeding subject to approval by the court of appe (Pet. App. A17). Before the briefing schedule was c cluded, the Commission moved to remand in order to p mit the Commission to reconsider its findings regard market dominance, as well as an allegation of rate discri nation raised by CP&L and other related issues. *Ib* Because the Commission sought to reopen and reconsi its decision, it did not file a brief in support of the exist decision in the court of appeals.

The court of appeals denied the Commission's motio remand the case (Pet. App. A17-A23), noting that Commission had failed to satisfy criteria prescribed by U.S.C. (Supp. III) 10327 thought to limit reconsideratio rail proceedings generally, and concluding that Sect 10729 barred a voluntary remand to the Commission i capital incentive rate proceeding. On the merits, the cour appeals upheld the Commission's determination that proposed rate qualified for consideration under Sect 10729 (Pet. App. A13-A17), rejected the railroads' cont tion that the Commission could not reconsider or revis findings after a court-generated remand (*id.* at A24-A held that the Commission's analysis of the market do nance issue was erroneous in various respects (*id.* at A A68), concluded that the Commission impermissibly fa to address CP&L's allegation of rate discrimination (*i* A68-A69), and directed the Commission to recons CP&L's request for certain cost data from the railro (*ibid.*).

On the jurisdictional issue pressed here by petitioners, the court of appeals held (Pet. App. A25):

> While Congress wished to give railroads assurances that if they made substantial investments, rates associated with these investments would remain undisturbed for 5 years, there is no hint it wished to protect erroneous Commission action. On remand, accordingly, the Commission shall have authority to take whatever action our opinion requires.

ARGUMENT

This case rests largely on its own peculiar facts and creates no conflict among the circuits. Nor is there any legal issue of general importance: only this case and its companion case, No. 80-2068, present the question tendered here because Section 10729 of the Interstate Commerce Act has been repealed. These two cases are the only ones brought under Section 10729 which have not been finally disposed of.[8]

1. The statute that petitioners allege was erroneously interpreted and applied by the court of appeals has been repealed after a short life of only four years. During the time that it was in force a total of five cases arose under the statute.[9] In four of the five cases the Commission's decisions have been reviewed by the courts of appeals, two by the

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[8]Even if the federal respondents were to agree with petitioners' contention that the court of appeals' decision did not exhibit proper deference to the administrative expertise of the Interstate Commerce Commission, this error would be one of misapplying appropriate standards to the peculiar facts of this case, an error not worthy of this Court's review. In any event, to the extent that the court of appeals provided unduly detailed instructions for remand in its original opinion, arguably intruding on matters within the Commission's primary jurisdiction, its decision on rehearing (Pet. App. B1-B8) indicates that the Commission has been afforded appropriate leeway in reexamining the parties' contentions and applying the law.

[9]See notes 5-7, *supra*, and accompanying text.

Court of Appeals for the District of Columbia Circuit (note 5, *supra*) and two (this case and No. 80-2068, *supra* the Court of Appeals for the Fifth Circuit. Petition argument, that capital incentive rates, once they bec effective, cannot be set aside by the Commission even u a judicial remand required to correct errors in the Com sion's decision, has been rejected by both courts on ident grounds, *viz.*, neither court of appeals found "clear convincing evidence" that Congress sought, through S tion 10729, to restrict judicial review so as to prevent Commission from correcting its errors on remand. App. A25, citing *Dunlop* v. *Bachowski*, 421 U.S. 560, (1975); *Celanese Chemical Co.* v. *United States*, 632 F 568, 575 n.15 (5th Cir. 1981); and *Houston Lightin Power Co., supra*, 606 F. 2d at 1143.[10]

Even if both courts of appeals erred in their conclu preservi[illegible] the judicial reviewability of Commission d sions under former Section 10729, which they did not, error can have no adverse precedential effect because t will be no more cases under the statute.[11]

2. Relying on this Court's decision in *Morris* v. *Gress* 432 U.S. 491 (1977), petitioners find "clear and convin evidence" in the legislative history of Section 10729 Congress intended to restrict judicial review (Pet. 19

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[10]This case and No. 80-2068 were decided by different panels Fifth Circuit.

[11]Petitioners would distinguish the court's authority to review its authority to remand (Pet. 15-16). The thrust of their argum that, even if the court found that Commission's decision as lawfulness of a capital incentive rate to be erroneous, it would h power to remand the decision. As the court of appeals recognize App. A24), this amounts to cutting off any effective judicial revie *Houston Lighting & Power Co., supra*, 606 F. 2d at 1143.

Petitioners' reliance on *Morris* v. *Gressette* is misplaced. In that case, this Court considered the reviewability of the Attorney General's failure to impose a timely objection to a change in voting laws of South Carolina under Section 5 of the Voting Rights Act of 1965. Under the Voting Rights Act, review by the Attorney General is one of two alternative preclearance procedures provided by Section 5, which also requires covered jurisdictions to delay implementation of state legislation effecting such changes until federal authorities have had an opportunity to determine whether the legislation satisfies the standards of the Voting Rights Act. This Court, having previously characterized those procedures as "unusual" and "severe" (*Allen* v. *State Bd. of Elections*, 393 U.S. 544, 556 (1969)), found clear congressional intent to preclude judicial review because it would necessarily extend the "extraordinary federal remedy beyond the period specified in the statute." *Morris* v. *Gressette*, *supra*, 432 U.S. at 504-505.

Under the court of appeals' decision, Section 10729 entails, by contrast, the possibility of limited delay occasioned by judicial review, not of newly enacted state legislation, but rather of a federal agency's approval of private railroad freight rates. The concerns that led Congress to preclude judicial review in *Morris* are absent here. The issue of reviewability of agency action involved in this case is governed, as the court of appeals recognized (Pet. App. A25), by this Court's prior decisions in *Dunlop* v. *Bachowski*, *supra*, and *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

3. Petitioners' contention (Pet. 14) that the court of appeals' ruling is "grossly unfair" to them because they have made tens of millions of dollars of capital investments in reliance on the unreviewability of capital incentive rates, or at least on the inability of the Commission to correct errors in a decision on remand from the court of appeals, misstates

the effect of the decision below. Contrary to what peti
ers imply, it is by no means certain that any of the railr
capital investments will be lost if the court of ap
decision stands. Such a "loss" on their investments
only occur if, on remand, the Commission conclude
that, in fact, the railroads do have market dominance
the coal movement in issue; and (2) that the capital ince
rate proposed by the railroads exceeds a maximum re
able level, and the Commission then prescribed a re
rate that did not yield "a reasonable and economic pro
return (or both) on capital employed in the busine
violation of 49 U.S.C. (Supp. III) 10704(a)(2).[12] If all
issues should be decided against the petitioners i
remanded proceeding, they would still be entitled by st
to a "reasonable and economic" return on their invest

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[12]In reality, what is at issue here is the level of return on inve
that any particular freight rate would yield. Thus, if a rate less t
proposed rate were ultimately prescribed by the Commission, t
roads would "lose" their investment only in the sense that the re
that investment would be less than they anticipated at the ra
proposed.

For these reasons, the decision below does not warra this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

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